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No. 94-1654

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

GLEN HEISER AND GEORGE SPENCER,

Petitioners,

v.

KEEN A. UMBEHR,

Respondent.

On Writ of Certiorari to the United
States Court of Appeals for the Tenth Circuit

BRIEF OF RESPONDENT

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QUESTION PRESENTED

1. Whether and to what extent the First Amendment protects independent contractors from retaliatory termination based on the content of their speech.

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BRIEF OF RESPONDENT

Respondent, Keen A. Umbehr, owns and operates a refuse collection service in Alma, Kansas, a rural town with a population of approximately 900. He brought suit against the Wabaunsee County Commission, through its individual members, alleging that the Commissioners terminated the parties' ten-year contractual relationship based solely on respondent's public criticism of their official conduct. The district court granted summary judgment to the petitioners, concluding that governmental entities may, without transgressing the First Amendment, predicate the award of government contracts on the content of an individual's

speech. The court of appeals reversed. The question presented in this case is whether and to what extent the First Amendment protects independent contractors from retaliatory termination based on the viewpoints they express.

STATEMENT OF THE CASE

1. *The Contractual Relationship Between the Parties.* Under Kansas law, each county is required to adopt a solid waste management system addressing all aspects of refuse management, including the "collection . . . and disposal" of residential trash. K.S.A. § 65-3402(a)-(b). In implementing this requirement, Wabaunsee County concluded that the "county wide system of waste disposal appears to be the most beneficial" because "there are no cities . . . of sufficient size to maintain a collection and disposal system." D.A. 109.¹ Accordingly, the County Commission in 1981 requested bids from private contractors to provide trash collection services for its residents. D.A. 600; McClure Dep. 25. In response to this invitation, respondent bid on and obtained the contract to collect residential refuse in six rural cities within the County, each of which adopted and ratified the terms of the agreement. P.A. 106. The contract, which was renegotiated in 1985, automatically renewed each year unless either of the parties provided sixty (60) days notice of an intent to terminate. J.A. 22; P.A. 107. Pursuant to this agreement, respondent provided uninterrupted residential collection services to the citizens of the County for a period of ten years.

¹ References to Defendants' Appendix (D.A.) and Plaintiff's Appendix (P.A.) are to the documents submitted to the United States Court of Appeals for the Tenth Circuit. All other citations are to materials proffered to the United States District Court for Kansas.

2. *Respondent's First Amendment Activities and the Commissioners' Response.* In early 1989, respondent began writing a weekly editorial column in the local newspaper entitled "My Perspective," which provided information and respondent's views on an array of issues involving the Board of Education, the local City Council, and the Wabaunsee County Commission. P.A. 57. In conjunction with his journalistic efforts and out of a general interest in county governance, respondent also attended and participated in meetings of the various local governing bodies. J.A. 22.

Although respondent's articles touched on issues ranging from the opening of the local pool, P.A. 59, to the participatory responsibilities of citizens in a democracy, P.A. 63, a number of his columns were critical of both the manner in which the Wabaunsee County Commission conducted its duties and the substantive policies that it adopted. Among the topics he addressed were: limitations on access to public records by the County government in violation of the Kansas Open Records Act (KORA), K.S.A. § 45-216; the use of government property for the benefit of private citizens and businesses; closed-door sessions of the County Commission in violation of the Kansas Open Meetings Act (KOMA), K.S.A. § 75-4317; overt efforts by the Commissioners to stifle critical press coverage; and the misuse of official powers by individual Commissioners. J.A. 22. During the period from early 1989 through the date of termination in January of 1991, respondent's commentary on these subjects resulted in a series of bitter and public disputes with the County Commissioners.

The first issue to generate friction between respondent and petitioners involved the Commission's policies on access to public records. To document his articles and to facilitate his participation in public meetings, Umbehr periodically

requested copies of records from the County Clerk. Until early 1989, the County's policy had been to charge ten cents per page for public documents. D.A. 376. As a direct result of Umbehr's requests, however, D.A. 378, the county adopted a new records acquisition policy, which required a written request and a three-day waiting period in addition to imposing a dramatically increased fee structure. D.A. 376.

In an article dated February 15, 1989, respondent took exception to this change in policy. P.A. 56. He suggested that the Commissioners were attempting to impede public access to records to deflect inquiries into the manner in which county affairs were operated. *Id.* "As long as they can keep us in the dark by making open records difficult to obtain," he wrote, "then they can run the county any way they please without having to answer to their tax-paying constituents. It is in this medium that political corruption can thrive without fear of exposure." *Id.*

The open records issue arose again several months later during a meeting held to discuss the details of the County budget. Prior to the meeting being called to order, respondent requested a copy of the proposed budget. P.A. 52, 72. County officials, however, indicated that additional copies were not available for members of the public and instead insisted that respondent comply with the new records policy, which would have required a written request and an ensuing waiting period. *Id.*

Since the Commissioners ostensibly had convened the meeting to permit citizen input, D.A. 406, Umbehr suggested that if the "budget hearing [is] going to have any validity, then the Commissioners should, in fact, provide extra copies of the budget to any member of the public who wishe[s] to see it." P.A. 72. Commissioner Spencer dismissed this simple request

stating, "Umbehr, you're just full of bull----. You're nothing but a damn troublemaker." *Id.*; D.A. 502.

At that point, Umbehr explained that he had conducted his own research on the issue and that "their policy on obtaining records was in violation of the Open Records Act, KSA 45-215 through KSA 45-223." P.A. 72. When the County Attorney concurred with respondent's assessment, the Commissioners relented and provided respondent with a copy of the document. *Id.*; D.A. 409.

Based on these events, respondent filed a letter of complaint with the County Attorney alleging that the County's policy regarding public access to records was in violation of the Open Records Act. K.S.A. § 45-216. In a series of columns discussing this issue, Umbehr explained that the open records provisions of Kansas law serve an essential function by permitting citizens to monitor and oversee the conduct of their elected officials. P.A. 77. He maintained that the Board, in derogation of this statutory purpose, had established a policy "that dissuades, frustrates, and inhibits public access to open records[.]" P.A. 72. After a review of these allegations and the requirements of the KORA, the County Attorney concluded that the fee schedule did indeed impose costs in excess of those permitted by statute. D.A. 537.

Another set of respondent's articles focused on the use of equipment belonging to the County Road and Bridge Department for the benefit of private individuals and entities. In a May 18, 1989 article, Umbehr reported that he had observed county equipment and personnel at work on a private project for three full days. P.A. 49, 60. He expressed his opinion that such practices represent "mismanagement of taxpayer money . . . [and] county resources." P.A. 60-61. In a column published on June 1, 1989, Umbehr discussed the

County's contention that the project involved an exchange of work or an in-kind transaction between the parties. P.A. 62. He noted that neither the County Commission nor the Road and Bridge Department kept any records concerning this exchange or the many other "trade-offs" that took place between the Department and private entities. *Id.* Because there was no way to verify that taxpayer resources were being used for appropriate government projects, Umbehr argued that the practice created too many opportunities for abuse and thus should be discontinued. *Id.*

The County Attorney was sufficiently concerned about the allegations contained in respondent's articles, as well as information supplied by County employees in the wake of these articles, that he referred the matter to the Attorney General of Kansas for investigation. P.A. 50; D.A. 157. In the interim, however, he specifically advised the Commission to cease this practice. P.A. 92; D.A. 156, 498, noting that, without adequate recordkeeping, "favoritism inevitably finds its way into the system." P.A. 50; D.A. 156. Despite these admonitions, the Commissioners declared that they were comfortable operating in "the gray areas" of the law. P.A. 92. Although they recognized that state statutes required a more rigorous accounting of such work "trade-offs," the Commissioners maintained that actual documentation simply was not necessary. D.A. 381, 383.

After an extensive inquiry conducted by the Kansas Bureau of Investigation, the Attorney General of Kansas issued a report on December 29, 1989, which confirmed respondent's allegations of improprieties in the Wabaunsee County Road and Bridge Department. D.A. 157-59. The Attorney General found that taxpayer funds and resources had been improperly used by county employees and that county

equipment and personnel had been devoted to projects that had at best "a limited public purpose." D.A. 158. He also emphasized that "documentation of such projects should be maintained whenever undertaken by county personnel or with county equipment where there is a benefit to private citizens or businesses." *Id.* Although the report found no malfeasance on the part of the Commissioners themselves, it concluded that "loose administrative practices and accounting procedures" made it difficult to determine whether county resources were being properly employed. *Id.*

Several months after respondent began writing his column, the Commissioners attempted to silence the criticism by targeting the vehicle for his expression -- the local newspaper. As the publication with the largest circulation in the County, the *Signal-Enterprise* had always served as the official newspaper, which entitled it to receive all legal notices and advertisements from the County government. On May 31, 1989, the Commissioners summoned the editor of the paper to a public meeting. D.A. 154. Commissioner Heiser stated bluntly that the "*Signal-Enterprise*, being the Official County Paper, needs to give more consideration to the letters being printed and possibly take a second look at what is put in the paper, to avoid anyone getting in trouble." P.A. 92. When respondent, who was present at the meeting, asked the Commissioner precisely what he meant by "taking a second look" at articles being published, the Commissioner expressed his view that respondent's articles were "offensive" and "should be censored" to ensure that they were "truthful." *Id.* (emphasis added); P.A. 90.

In a front page story appearing on June 1, 1989, the editor denounced the Commissioners' efforts to control the content of an independent newspaper. "I have been associated

with *The Signal-Enterprise* for 38 years," the editor wrote, "and have never been threatened for running signed articles or Letters to the Editor until this past Wednesday." D.A. 154. He indicated that "[w]e have no intention to censor anyone's articles regardless of high pressure tactics." *Id.* As a consequence, when the County designation came up for renewal in January of 1990, the Commissioners stripped the *Signal-Enterprise* of its official status and transferred the designation to a smaller paper in a neighboring community. P.A. 53, D.A. 493.²

In his June 22, 1989 column, respondent recounted the events that took place during the most recent meeting. P.A. 64. Elected officials, respondent opined, must be willing to endure, even welcome, oversight of their official actions by the citizens they represent. *Id.* "When public exposure of official county actions makes our commissioners angry and want to stop newspaper articles that express a viewpoint that is different from theirs, then obviously their actions cannot stand up to the scrutiny of the public." *Id.*

Open access to County affairs again became an issue when the Commissioners expelled all members of the public, including Umbehr, from a public meeting held on June 18, 1989. During that gathering, the Commissioners went into "executive session" to discuss the accusations concerning the County Road and Bridge Department. In his column, Umbehr charged that this action violated the Kansas Open Meetings

² Although the Commissioners maintained that they simply wanted to rotate the official designation, they acknowledged that the *Signal-Enterprise* had always been the official paper and that the designation had never rotated previously. D.A. 501. Tellingly, the official designation returned to the *Signal-Enterprise* one year later after the paper was sold to a new owner who refused to publish Umbehr's articles. P.A. 51, 97.

Act, K.S.A. § 75-4317, which prohibits officials from conducting business in closed session, and he noted that he had referred the matter to the Attorney General for investigation. P.A. 67.

In August 1989, the Attorney General determined that the Commission had indeed violated the provisions of the KOMA by closing its meeting to members of the public. P.A. 71. Shortly thereafter, the Commissioners agreed to a consent decree imposed by the state under which they acknowledged that they had violated the statute and agreed to abide by its terms in the future. *Id.* The consent decree also required that each Commissioner receive a copy of the KOMA and that the County Attorney provide remedial instruction -- in open session -- on the requirements of the Act. *Id.* The County Attorney conducted the required counseling on November 1, 1989. P.A. 53.

On the heels of these events, the Commissioners voted on February 5, 1990, to terminate Umbehr's contract. The purported reason for doing so was not any dissatisfaction with his service or a desire to alter the existing county-wide system of collection services but rather that the contract was signed by "a number of officials that are no longer in office" D.A. 164. In their notice of termination, however, the Commissioners mistakenly cited the 1981 agreement between the parties, which was no longer in effect, and thus the contract continued for another term. P.A. 81; D.A. 165. The Commissioners agreed, however, that the contract would be terminated the following year. P.A. 96.

On March 29, 1990, one month after the unsuccessful effort to sever the contractual relationship, the Commissioners voted to increase user rates at the landfill for the fourth time since respondent began writing his articles, this time doubling

his disposal bill from \$1200 to \$2400 a month. P.A. 54, 84, 94; D.A. 170A. Over nearly unanimous opposition from the city councils, P.A. 84; D.A. 171, the new rates went into effect on June 1, 1990. On that date, respondent filed an action in state court contending that the rates were unsupported by any factual data. D.A. 178. The state court eventually agreed, finding the rates to be arbitrary and capricious and retroactively enjoining their application. P.A. 120-21 (rates were "a shot in the dark").³

Over the course of the next year, respondent continued to speak out on local political issues both in his column and during his unsuccessful bid for a seat on the County Commission.⁴ Umbehr's criticism of the Commissioners' policies engendered mounting resentment and hostility, which often manifested itself in abusive verbal attacks against him during public sessions of the Commission. For instance, in March of 1990, shortly after the Commission had voted to terminate his contract, respondent asked for permission to address the Board. In response, Commissioner Spencer asked respondent if he was prepared to "get down on [his] knees and beg" for permission to address the Commission. P.A. 81, 87; D.A. 504. When Umbehr made a similar request in late May, Commissioner Heiser told him he could either "be quiet" or he would be physically removed from the meeting by a

³ Based on a motion for reconsideration, the court subsequently concluded that Umbehr did not comply with the statute of limitations and thus dismissed the case on grounds unrelated to the merits. *Umbehr v. Board of County Commissioners*, No. 90-C-15 (October 1, 1990), *rev'd*, 825 P.2d 1160 (Kan. Ct. App.), *rev'd*, 843 P.2d 176 (Kan. 1992).

⁴ Umbehr officially declared his candidacy on November 29, 1989. P.A. 80. If elected, he would have been precluded from voting on his own contract. K.S.A. § 75-4304.

sheriff's officer. P.A. 85; D.A. 612. And a few months later, again during public session, Commissioner Spencer told Umbehr that he was nothing more than "trash, the stuff he hauled around in his trucks." P.A. 87; D.A. 451, 504.

As the renewal decision approached, the cities, as they had the year before, contacted the Commissioners to express their satisfaction with the existing contractual arrangement and to request that the contract be renewed. McClure Dep. 230. Despite these requests, the Commissioners terminated the contract between the parties on January 28, 1991. Ex. 65.

Although they had expressed no dissatisfaction with the county-wide method of refuse collection when they had attempted to cancel the agreement just eleven months earlier and indeed had indicated the contract would be rebid, D.A. 164, 350, the Commissioners now alleged that the contract was cancelled because the County had no interest in solid waste collection. Ex. 65; D.A. 346-47, 513. The Commissioners reached this conclusion without ever reviewing the solid waste management plan, consulting with authorities, conducting research, D.A. 346-47, 508, or amending the existing plan, as required by law. K.S.A. §§ 65-3405(a), (g). They also acknowledged that the county-wide plan had been adopted to obtain a lower collection rate for citizens of the County by providing a larger market to bidders. P.A. 91; D.A. 345.

In addition to the circumstantial evidence suggesting that the Commissioner's rationale was pretextual, one Commissioner frankly admitted that the relationship was terminated because it provided respondent with "a platform to cause a lot of problems with the county . . . [and] gave him an excuse to come into our meetings." P.A. 89. One year later, Commissioner Spencer publicly noted that "[w]e've been

let with more negative stuff these past three years. . . . when these negative things come up I get upset and I feel like I need to retaliate." P.A. 27.¹

Following termination of the contract, respondent submitted individual bids to each of the municipalities formerly covered by the county-wide agreement. Although he eventually was able to obtain contracts with five of the towns, respondent lost roughly 17 percent of his revenue when one of the cities elected to contract with a different collection service. J.A. 23; P.A. 100.

3. *Proceedings Below.* In May 1991, respondent filed suit under 42 U.S.C. § 1983 in the United States District Court for the District of Kansas against the Commissioners in both their official and individual capacities. P.A. 1. He maintained that his contract with Wabaunsee County had been terminated in direct retaliation for his public criticisms of the County Commission in violation of his rights under the First and Fourteenth Amendments to the United States Constitution.

On December 30, 1993, after the completion of all discovery, P.A. 25, the district court granted the Commissioners' motion for summary judgment. J.A. 10. In accordance with established summary judgment standards, the court drew all reasonable inferences from the record in favor of respondent, expressly assuming that his comments were on matters of public importance and that they motivated the County's decision to terminate his contract. J.A. 14. The court also concluded that if respondent had been a public employee, the First Amendment would have protected him

¹ The one member voting against termination, who had released both respondent and the respondent in the November 1988 election, testified that Fisher and Spencer were unhappy about Urbster's articles because they put the Commission "in not very good light." (Anderson Dep. 5).

from any adverse action based upon application of the test established in *Pickering v. Board of Education*, 391 U.S. 563 (1968). J.A. 14. Relying on a line of cases holding that independent contractors enjoy no First Amendment protection from actions based on party affiliation, the district court held that "the First Amendment does not prohibit defendants from considering plaintiff's expression as a factor in deciding not to continue with the trash hauling contract at the end of the contract's annual term." J.A. 14.

On appeal, a unanimous panel of the United States Court of Appeals for the Tenth Circuit reversed. J.A. 21. The court of appeals concluded that independent contractors are entitled to First Amendment protection for speech on matters of public concern and that governmental entities may not use their economic relationships to suppress public criticism of their actions. J.A. 37. In reaching this result, the court found that the patronage cases cited by the district court had "limited relevance to whether independent contractors should be protected against retaliation for speech on matters of public concern." *Id.* It noted that by allowing "governments to terminate a public contract because of the contractor's speech, courts have permitted governments to accomplish indirectly that which they cannot accomplish directly -- punishment of speech they do not like." J.A. 33.

The panel also found that the loss occasioned by termination of a contract is no less constitutionally cognizable than the loss suffered by an employee. J.A. 35-36. Government efforts to suppress public dialogue and debate, the court observed, "can be just as effective and offensive when the state reduces a citizen's income by twenty percent as when the state reduces the citizen's income by one hundred percent." J.A. 36 (citation omitted). Based on its findings,

the court of appeals remanded the case for trial.⁶ A subsequent petition for rehearing and a suggestion for rehearing in banc were rejected. J.A. 21. This Court granted certiorari on June 29, 1995. 115 S. Ct. 2639 (1995).

SUMMARY OF ARGUMENT

The First Amendment, in its most fundamental application, protects the right of every citizen to challenge the wisdom and propriety of government actions and to engage in vigorous public debate on issues of government policy. Indeed, viewpoint-based efforts to restrict or punish speech on matters of public concern are subject to the most exacting constitutional scrutiny. The burden in any particular case of demonstrating the propriety of a less rigorous standard of review is borne by the government.

As the court of appeals correctly concluded, the termination of a public contract, like the denial of any other government benefit, in retaliation for an individual's expressive activity serves as an effective deterrent to speech. Because such economic reprisals permit governmental entities to accomplish a result they could never achieve directly -- the punishment of ideas which those in power find displeasing -- adverse actions premised on speech impose an intolerable burden on freedom of expression. The government may not, therefore, use its contractual agreements as an instrument to control or suppress speech.

⁶ In light of what it perceived as conflicting authority, the court of appeals affirmed the district court's grant of qualified immunity. J.A. 38. This Court denied respondent's Conditional Petition for Certiorari on this issue. *Umbehr v. Heiser*, 115 S. Ct. 2616 (1995).

Moreover, unlike the employment context, in which the government "has interests in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general," *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), the government, in its role as contracting agent, has no unique interests that would justify a deviation from traditional strict scrutiny standards. As an employer, the government retains considerable latitude to regulate public employee speech based on its legitimate interests in avoiding workplace disruptions and fostering healthy working relationships. These factors, however, cannot justify similar limitations on the First Amendment rights of public contractors who typically function outside of a traditional office atmosphere. Speech on matters of public concern may serve as a basis for public contracting decisions, therefore, only if necessary to further a vital government interest.

The Commissioners, in contrast, advance a far different vision of the First Amendment, a vision that is fundamentally at odds with the traditional protections afforded to speech on matters of public concern. In essence, they advocate the creation of an independent contractor exception to the First Amendment, a separate jurisprudential category that places the expressive activity of public contractors, even on core political issues, beyond the protective scope of the First Amendment. This categorical approach is based not on any legitimate interest in regulating speech, but solely on claims of administrative necessity, including the unsupported assertion that any limitation on the discretionary authority of local officials will interfere with their ability to provide needed services. No legal doctrine nor sound public policy rationale justifies the sweeping authority the Commissioners

request. Government officials neither need, nor do they possess "unfettered discretion" to allocate government resources free from fundamental constitutional limitations on their authority.

At bottom, there is no room within the confines of the First Amendment for a governmental privilege to retaliate against speech. This Court, therefore, should affirm the decision of the court of appeals. In addition, because the Commissioners are unable, regardless of the standard applied, to demonstrate any legitimate interest in regulating respondent's speech, the Court should conclude that the expression involved in this case is protected by the First Amendment. Accordingly, it should remand to the United States District Court solely for a factual determination concerning whether the termination was motivated by respondent's expressive activity or by legitimate considerations unrelated to the suppression of speech.

ARGUMENT

I. Retaliation Against Independent Contractors For Speech On Matters Of Public Concern Can Be Justified Only By A Compelling Interest

A. Speech On Matters Of Public Concern, Regardless Of The Identity Of The Speaker, Is Entitled To The Utmost Protection

The guarantees of the First and Fourteenth Amendments expressly prohibit state and local governments from taking any action "abridging the freedom of speech." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 500 (1952). This fundamental principle of our democratic system "enable[s] every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them." *Wood v. Georgia*, 370 U.S. 375, 392 (1962) (citation omitted). Recognizing that "[t]hose who won our independence believed . . . that public discussion is a political" obligation, this Court has emphasized that it "is as much [the citizen's] duty to criticize as it is the official's duty to administer." *New York Times v. Sullivan*, 376 U.S. 254, 270, 282 (1964).

Respondent's speech, which challenged the policies of the County Commission on issues ranging from the appropriate use and allocation of taxpayer resources to the ability of county residents to obtain information about the operation of their government, falls squarely within the core of the First Amendment's protections. Citizen participation in public dialogue concerning the manner in which the

government operates and the policy choices it makes is critical to the proper functioning of our system. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Based on "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times*, 376 U.S. at 270, this Court "has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (citation omitted).

Not only the content of respondent's speech, but the medium in which it was expressed -- a weekly editorial column in the newspaper -- dictates special solicitude and protection. Cf. *Connick v. Myers*, 461 U.S. 138, 147-48 (1983) (level of protection is dependent on "content, form, and context of a given statement"). Like other forms of political speech, "the expression of editorial opinion" occupies a central position in First Amendment jurisprudence. *FCC v. League of Women Voters of California*, 468 U.S. 364, 381 (1984). "[B]y informing and arousing the public, and by criticizing and cajoling those who hold government office," editorials ensure that the public "receiv[es] a wide variety of ideas and views" on issues confronting the polity. *Id.* at 382. Attempts "to restrict precisely that form of speech which the Framers of the Bill of Rights were most anxious to protect" are subject to the most exacting scrutiny. *Id.* at 383-84.

Notwithstanding the core political nature of the speech at issue here, the Commissioners suggest that the respondent's expressive activity remains unprotected unless the Court elects to extend the rights enjoyed by public employees to independent contractors. Pet. Br. at 11. The Constitution

itself, however, guards the basic liberties of all citizens, and thus there is no need to *extend* the First Amendment's guarantees to independent contractors. Nor does speech lose its protected status simply because it has been uttered by a particular class of persons or entities. The "identity of the speaker," this Court has held, does not deprive "speech of what otherwise would be its clear entitlement to protection." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777-78 (1978). Respondent's status as a government contractor, therefore, has no independent constitutional significance.

Rather, speech on matters of public concern is entitled to the highest constitutional protection unless the government can establish that it has some interest which warrants application of a less searching standard of review. Absent a showing, for example, that the nature of the relationship between the speaker and the government implicates special governmental interests, see, e.g., *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (school officials may regulate student speech "even though the government could not censor similar speech outside the school"); *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) (state has interests as employer that are not applicable to general population), viewpoint-based limitations on First Amendment freedoms are presumptively invalid. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983). In the instant case, the burden of demonstrating that the contractual relationship provides a legitimate basis for curtailing or eliminating all protection for speech by independent contractors rests squarely on the Commissioners - a burden they have not and cannot meet. See *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1013

(1995) (government must justify adverse actions based on speech); *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (government bears burden of demonstrating interest in restricting First Amendment rights).

B. Termination Of A Public Contract In Retaliation For Speech Impermissibly Restricts Protected Expression

For purposes of deciding the Commissioners' motion for summary judgment, the district court and court of appeals, drawing all inferences in favor of respondent as the non-moving party, assumed that the evidence in the record was sufficient to support a finding of retaliatory intent. J.A. 14, 24-26. The question presented to this Court, therefore, is whether the termination of respondent's contract in retaliation for the viewpoints he expressed states a cognizable First Amendment claim or if, as the district court held, independent contractors enjoy no First Amendment protection for speech on matters of public concern.

The Commissioners contend that the termination of a contract in response to speech, as opposed to more direct forms of regulation, does not raise substantial First Amendment concerns. Pet. Br. at 26. Restrictions on speech, however, need not directly proscribe expressive activity to run afoul of the First Amendment. Instead, "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 11 (1972). This principle forbids government officials from using the economic benefits they dispense as leverage to deter either critical speech or the

exercise of other constitutional guarantees. "Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right" in exchange for a discretionary benefit. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2317 (1994). See also *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

By withholding or withdrawing an economic advantage based on an individual's expressive activity, the government imposes what amounts to a penalty on the exercise of core personal freedoms. "To deny a [benefit] to [individuals] who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech." *Speiser v. Randall*, 357 U.S. 513, 518 (1958). See also *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 140 (1987) (requiring work on the Sabbath as a condition for unemployment compensation "puts the same kind of burden upon the free exercise of religion as would a fine"). Because direct efforts to limit or penalize speech would clearly be impermissible, the same result may not be achieved indirectly by using government benefits as a form of economic coercion. *Perry v. Sinderman*, 408 U.S. 593, 597 (1972).

This doctrine applies in any number of contexts and prohibits attempts to condition the receipt of a government benefit, whether it be employment, *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 77-78 (1990); *Pickering*, 391 U.S. at 568; *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967), unemployment benefits, *Hobbie*, 480 U.S. at 140, tax exemptions, *Speiser*, 357 U.S. at 518, or even public contracts, *Lefkowitz v. Turley*, 414 U.S. 70, 82-83 (1973), on an individual's exercise of fundamental rights. "While the compulsion may be indirect, the infringement upon free

exercise is nonetheless substantial." *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 717-18 (1981).

This Court has concluded on numerous occasions that the failure to renew a contract based on expressive activity imposes impermissible burdens on First Amendment interests. In *Perry v. Sinderman*, 408 U.S. 593, 597 (1972), for example, college officials elected not to renew a professor's contract at the end of its term, allegedly in response to various statements he made before the state legislature. This Court, in an oft-cited passage, emphatically rejected the suggestion that the relationship, which had expired under its own terms, could be discontinued based on the individual's speech.

[E]ven though a person has no "right" to a valuable government benefit and even though the government may deny him the benefit for any number of reasons . . . [i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow government to "produce a result which [it] could not command directly."

Id. at 597 (citation omitted). See also *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 413 (1979) (refusal to renew contract based on expression); *Mt. Healthy v. Doyle*, 429 U.S. 274, 282 (1976) (same); *Keyishian*, 385 U.S. at

592, 605 (refusal to renew contract for failure to sign loyalty certificate).

Similarly, in a challenge based on the Fifth Amendment, this Court in *Lefkowitz v. Turley*, 414 U.S. 70 (1973), held that the State of New York could not require independent contractors to waive their rights against self-incrimination as a condition of receiving government business. The threatened loss of revenue, this Court held, impermissibly required contractors to forgo fundamental constitutional protections. *Id.* at 82. In assessing the coercive effect of the state's action, the Court rejected the suggestion that there is "a difference of constitutional magnitude between the threat of a job loss to an employee of the State, and a threat of loss of contracts to a contractor." *Id.* at 83.

Based on these principles, the court of appeals properly concluded in this case that a rule which permits government officials to base contracting decisions on expressive activity would allow "governments to accomplish indirectly that which they cannot accomplish directly -- punishment of speech they do not like." J.A. 33-34. While the Commissioners were free under the terms of the contract to terminate the relationship "for any reason or for no reason at all," *Rankin v. McPherson*, 483 U.S. 378, 383 (1987), they were not entitled to use the contractual relationship as a method of curtailing or penalizing speech they found offensive. *Id.* at 383-84.

There is little doubt that the government's use of speech as a criterion in awarding contractual benefits poses a significant risk of stifling or chilling free and open debate. See *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("threat of sanctions may deter [the] exercise of [First Amendment rights] almost as potently as the actual application of sanctions").

"The freedom of speech and of the press guaranteed by the Constitution," this Court has stressed, embraces the liberty to discuss matters of public concern without "fear of subsequent punishment." *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940). Absent First Amendment protection, the threat "of subsequent punishment" creates a powerful deterrent to critical commentary by those who wish to retain or hope to secure contractual agreements with the government. *Pickering*, 391 U.S. at 574. To preserve their economic viability, independent contractors would be forced to engage in a form of self-censorship, weighing the benefits of expressing their opinions against the potential costs associated with losing current or future contractual relationships. Cf. *Thomas*, 450 U.S. at 717-18 (eligibility requirements required individual to choose between religious beliefs and benefits). Permitting the award of public contracts on the basis of expressive activity, therefore, "necessarily will have the effect of coercing the [contractor] to refrain from the proscribed speech." *Speiser*, 357 U.S. at 519. See also *Minneapolis Star & Tribune*, 460 U.S. at 585 (financial burdens "can operate as effectively as a censor to check critical comment"); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) (restrictions on compensation have direct effect on incentives to speech).⁷

⁷ The sheer magnitude of the government's presence in the marketplace and, concomitantly, its ability to influence the nature and scope of public discussion through its contractual relationships is staggering. During fiscal year 1994, for example, the federal government alone expended over \$196 billion on procurement contracts. OFFICE OF MANAGEMENT AND BUDGET, FEDERAL PROCUREMENT REPORT 7 (1994). Were government officials permitted to allocate these resources based on expressive activity, the collective chilling effect on speech, to say the least, would be substantial.

Against this backdrop, therefore, it is not surprising that the courts of appeals, almost without exception, have readily acknowledged that independent contractors and other individuals in non-employment relationships with the government are entitled to First Amendment protection from retaliation based on the content of their speech. In addition to the decision of the Tenth Circuit in this case, J.A. 21, and in *Abercrombie v. City of Catoosa*, 896 F.2d 1228 (10th Cir. 1990) (tow truck referrals may not be discontinued in retaliation for political opposition), four other circuits have determined that independent contractors and other non-employees are protected by the First Amendment from retaliatory actions premised on their public criticism of government officials. *Blackburn v. City of Marshall*, 42 F.3d 925, 934 (5th Cir. 1995) (adverse action against tow truck operator for criticizing bidding methodology); *Copsey v. Swearingen*, 36 F.3d 1336, 1346 (5th Cir. 1994) (termination of contractor providing vending services in state capitol building); *North Mississippi Communication v. Jones*, 792 F.2d 1330 (5th Cir. 1986) (removal of county designation from local paper in retaliation for critical editorials); *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993) (assuming without deciding that tow truck operator could state a retaliation claim);⁸ *Havekost v. U.S. Dep't of Navy*, 925 F.2d 316 (9th Cir. 1991) (licensee working in navy

⁸ Cf. *Termite Control Corp. v. Horowitz*, 28 F.3d 1335, 1353 (2d Cir. 1994) (independent contractor may state claim for equal protection violation based on retaliation for the exercise of First Amendment rights). But cf. *Planned Parenthood of Dutchess-Ulster, Inc. v. Steinhilber*, 60 F.3d 122, 128 (2d Cir. 1995) (remanding for decision on scope of First Amendment protection for government contractors and suggesting circuit has not yet adopted a position).

commissary may state claim for retaliatory termination); *Smith v. Cleburne County Hospital*, 870 F.2d 1375 (8th Cir. 1989) (independent contractor physician entitled to protection for speech on matters of public concern).⁹ These decisions properly conclude that the retaliatory use of public contracts as a vehicle for affecting public debate is no more permissible than efforts to punish speech directly or through the discriminatory allocation of other government benefits.

Finally, it is important to note that the Commissioners admit in this Court, as they did in the district court, that this case does not involve the allocation of a government contract based on political affiliation. Pet. Br. at 15.¹⁰ Accordingly, the Court need not address or resolve the question of whether patronage practices can be justified as an exception to the First

⁹ Only one circuit court has taken a contrary view, and it provided no analytical justification for its decision. In *Downtown Auto Parks v. City of Milwaukee*, 938 F.2d 705 (7th Cir.), cert. denied, 112 S. Ct. 640 (1991), the Seventh Circuit, in a footnote, uncritically extended its previous conclusion that independent contractors are not shielded from patronage practices to an action involving retaliation for speech. *Id.* at 709 n.5. See also *Lewis v. Hager*, 956 F.2d 1164 (6th Cir. 1992) (unpublished opinion) (*Perry* does not apply to independent contractors). In the district court, the Commissioners cited this holding in support of their contention that local officials enjoy "a type of exempt or privileged retaliation," D.A. 656 -- a "privilege" that is antithetical to well-established First Amendment principles.

¹⁰ In their reply in support of summary judgment, the Commissioners stated, "[d]efendants will be the first to concede that no patronage was involved." D.A. 657.

Amendment rights otherwise enjoyed by independent contractors.¹¹

Therefore, assuming that respondent's contract with Wabaunsee County was terminated in response to his criticisms of the Commissioners' policies, respondent unquestionably has stated a cognizable claim under the First Amendment. The question remains, however, what standard should apply in assessing claims of retaliation by independent contractors.

¹¹ Despite relying extensively in the Petition for Certiorari on a series of decisions addressing the patronage issue, the Commissioners do not even cite, much less discuss, the cases that they claim created a decisional split in the circuits. Pet. Cert. at 13-18. Nonetheless, the court of appeals correctly concluded that the patronage decisions have "limited relevance" in cases involving retaliation for speech. J.A. 37. Patronage has been justified primarily based on its historic roots, which some have suggested provide the practice with a distinct, non-textual, constitutional status, *Rutan*, 497 U.S. at 96-97 (Scalia, J., dissenting); *Elrod v. Burns*, 427 U.S. 347, 377-78 (1976) (Powell, J., dissenting), and based on various systemic benefits, which include strengthening the two-party system, motivating political participation, and improving political accountability. *Rutan*, 497 U.S. at 104-110 (Scalia, J., dissenting); *Branti v. Finkel*, 445 U.S. 507, 527-31 (1980) (Powell, J., dissenting); *Elrod*, 427 U.S. at 379 (Powell, J. dissenting).

Whatever merit these principles have in the patronage context, they provide scant support for the contention that governmental entities are immune from liability when they attempt to punish independent contractors for speech. To be sure, officially-sanctioned retaliation against disfavored views enjoys no rich history in the Republic and advances no goals that are consistent with our democratic tradition. As Justice Powell recognized, even if patronage dismissals of public employees were constitutionally permissible, employees would still be entitled to First Amendment protection from retaliation based on speech because "no substantial state interest justify[es] the infringement of speech." *Branti*, 445 U.S. at 527 (Powell, J., dissenting).

C. Unlike The Public Employment Context, The Government Has No Special Interests In Regulating The Speech of Independent Contractors

The appropriate inquiry in this case is not, as the Commissioners would have it, whether the *protections* provided to public employees by this Court should be extended to independent contractors, but rather whether the special *limitations* placed on the free speech rights of public employees should similarly restrict the interests of individuals in non-employment economic relationships with the government. Based on the lack of any comparable government interest in regulating the speech of independent contractors, the balancing test used to assess the extent of public workers' First Amendment interests is inapplicable.

In each of its public employment cases, this Court has stressed that while citizens may not be "deprived of fundamental rights by virtue of working for the government," *Connick*, 461 U.S. at 147, the government, in its role as employer, has unique interests that are not present when it attempts to regulate the speech of the population generally. See, e.g., *NTEU*, 115 S. Ct. at 1012; *Waters v. Churchill*, 114 S. Ct. 1878, 1886-87 (1994); *Pickering*, 391 U.S. at 568. Accordingly, the Court in *Pickering* adopted a test for public employee speech that reflects the government's heightened interest in regulating the speech of the individuals it employs. First, while private citizens have First Amendment protection even for speech that does not touch on major issues of the day, public employees must generally establish that their speech involves matters of public concern. *Waters*, 114 S. Ct. at 1887; *Connick*, 461 U.S. at 147. Second, even if the

speech involves a matter of public interest, the court must still balance the employee's interest in participating in public debate against the State's interest "as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568; *Connick*, 461 U.S. at 142.¹²

The government's interest in regulating speech in the office environment is premised on considerations that are unique to that context and reflect the special characteristics of the relationship. For example, the government, like any employer, must be able to foster healthy working relationships among its personnel including the maintenance of "discipline by immediate supervisors" and "harmony among coworkers." *Pickering*, 391 U.S. at 569-70; *Rankin*, 483 U.S. at 388. As a result, the government may take adverse action against employees for using offensive language in the office, undermining superiors through recalcitrant speech, or counseling others to ignore legitimate instructions. *Waters*, 114 S. Ct. at 1886. It also has an interest in ensuring that speech does not have "a detrimental impact on close working relationships for which personal loyalty and confidence are necessary," and does not "impede[] the performance of the speaker's duties" *Rankin*, 483 U.S. at 388. Due to secondary effects of speech in the office environment,

¹² Several courts have committed the same analytical error as the Commissioners by concluding that public employees have special First Amendment rights that the Court has not conferred on the remainder of society. In *Ambrose v. Knotts*, 865 F. Supp. 342 (S.D. W. Va. 1994), the court held that *Pickering* and *Connick* "create[d] a very limited, specific, free-speech protection for public employees. It did not create a general protection resident in the population as a whole." *Id.* at 345 (emphasis added); *Blackburn*, 42 F.3d at 931 (noting that district court had improperly inverted the public employee analysis).

therefore, the government is permitted to take adverse action against an employee based specifically on the content of the communication, an action that would be highly suspect in other settings. See, e.g., *Bellotti*, 435 U.S. at 786.

These considerations, however, do not apply to independent contractors who are not in employment relationships with the government. The government's interest in regulating the speech of its employees to ensure proper management and direction of its personnel, for instance, has no relevance to independent contractors like respondent who have no daily interaction with government superiors or co-workers. *NTEU*, 115 S. Ct. at 1012, 1015 (government generally must establish speech is disruptive to workplace); *Pickering*, 391 U.S. at 569-70 (government has no interest in controlling speech that does not interfere with daily working relationships). Similarly, independent contractors generally are not viewed as representatives of the government and thus the public does not perceive their speech as an indication of government policy. Cf. *Rankin*, 483 U.S. at 389 (statement made by employee in private could not be construed by public as position of department); *Hazelwood*, 484 U.S. at 271 (public may perceive school newspaper or play as bearing "imprimatur" of school); *McMullen v. Carson*, 754 F.2d 936, 939 (11th Cir. 1985) (individual properly terminated after he identified himself as an employee of the sheriff's office and a recruiter for the Ku Klux Klan). The nexus between speech and the government's interest in promoting efficiency, therefore, is extremely attenuated in the independent contractor context. Adverse action, therefore, rather than promoting legitimate state interests, will often serve only to punish or deter speech. See *NTEU*, 115 S. Ct. at 1015.

Based on this analysis, the Fifth Circuit concluded that the restrictions applicable to government employees should be applied only in situations that mirror the employer-employee relationship. Observing that public employees' First Amendment rights are considerably more circumscribed than those of the general public, the court in *Blackburn*, 42 F.3d at 931-34, concluded that the government possessed no comparable interest in limiting the First Amendment rights of a tow truck operator who was not in the employ of the city and had no daily interaction with other city workers. *Id.* Accordingly, because the deprivation was unrelated to any legitimate government interest, the court concluded that the city had violated the plaintiff's First Amendment rights by relying on impermissible considerations in allocating a government benefit. *Id.*¹³

¹³ Petitioners' discussion of the differences between independent contractors and employees, which is supported by neither case precedent nor academic literature, attributes a misleading degree of homogeneity to independent contractors. Pet. Br. at 17-23. Independent contractor relationships occupy a vast spectrum, from arrangements, like this one, in which the contractor completes his responsibilities with little or no day-to-day oversight to those in which the independent contractor is virtually indistinguishable from an employee. *Logue v. United States*, 412 U.S. 521, 531-32 (1973) (contractor will often perform tasks "that would otherwise be performed by" employees). Admittedly, application of the *Pickering* test may be appropriate in situations that are sufficiently similar to employment. See, e.g., *Copsey*, 36 F.3d at 1344-45; *Havekost*, 925 F.2d at 318 (*Pickering* is appropriate test for licensee working in naval station commissary); *Smith*, 870 F.2d at 1381 (applying *Pickering* where "there is an association between the independent contractor doctor and the Hospital that ha[s] similarities to that of an employer-employee relationship"). Cf. *White Plains Towing*, 991 F.2d at 1059 (assuming without deciding that *Pickering* applies to relationships that are "tantamount to employment").

The court of appeals in the instant case, by concluding without analysis that the *Pickering* test should be applied to the speech of independent contractors, adopted an approach that is unduly restrictive of First Amendment interests. J.A. 37. Without the unique considerations present in the office environment, an adverse action taken against an independent contractor based solely on the viewpoint being expressed warrants application of strict scrutiny. "A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a 'law . . . abridging the freedom of speech, or of the press.'" *League of Women Voters*, 468 U.S. at 383-84 (citation omitted). See also *Simon & Schuster*, 502 U.S. at 115-16 (content-based restrictions on speech are presumptively unconstitutional); *Sable Communications of California v. FCC*, 492 U.S. 115, 126 (1989). Outside of the employee speech context, this Court has subjected government actions that place an impermissible condition on the receipt of a benefit or privilege, like direct restrictions on these same interests, to strict constitutional scrutiny. *Rutan*, 497 U.S. at 78 (conditioning employment on political belief constitutes an unconstitutional condition and may be justified only by demonstrating a vital government interest); *Hobbie*, 480 U.S. at 140-41 (to justify denial of benefits on grounds that infringe First Amendment interests government must demonstrate compelling interest narrowly tailored to accomplish goal). See also *Speiser*, 357 U.S. at 519.¹⁴ As a result, at least as to

¹⁴ Because the speech in this case clearly relates to matters of public concern, the Court need not address whether contractors, like the citizenry generally, are shielded from retaliatory action against purely (continued...)

independent contractors who function outside of a traditional employment context, adverse actions premised on expressive activity may be justified only if they serve a vital or compelling government interest.

**D. Regardless Of The Test Applied,
Termination Of Respondent's Contract
Based On The Speech Involved In This Case
Would Violate The First Amendment**

After concluding as a general matter that independent contractors are protected from retaliation for speech on matters of public concern, the court of appeals in this case did not attempt to determine whether respondent's speech would be protected under the test it adopted. "The ultimate question -- whether the speech is protected -- is a question of law." *Rankin*, 483 U.S. at 386 & n.9. See also *Connick*, 461 U.S. at 150 n.10. Resolution of this issue is appropriate at this time given that discovery is complete, P.A. 25, and the parties have briefed the issue before both lower courts. *New York Times v. Sullivan*, 376 U.S. at 283-84 (effective judicial administration favors review of evidence to determine scope of protection). Based on the record in this case, the Court should hold that, under either standard, the Commissioners have failed to establish a sufficient interest in regulating respondent's speech on matters of public concern. As a result, respondent is entitled to prevail on his First Amendment claim if on remand he succeeds in demonstrating

¹⁴(...continued)
private speech. See *Connick*, 461 U.S. at 147 (outside employment context First Amendment protects mundane as well as political speech).

that the Commissioners terminated his contract in retaliation for his public criticism of their conduct.

1. Under Strict Scrutiny, Termination of Respondent's Contract Based On His Speech Would Be Impermissible

Application of the traditional strict scrutiny standard for viewpoint-based restrictions on speech is appropriate here because respondent operated independently of any government supervision. As the Commissioners note, Umbehr had complete discretion over the manner in which he structured his operations, there was little or no oversight by the County, no daily interaction with either the Commissioners or other county employees, and no supervisory relationship with any county official -- all factors that significantly diminish, rather than increase, the government's interest in regulating speech. Pet. Br. at 19-20.¹⁵ Because the factors justifying special limitations on the free speech rights of public employees are not present in this case, the Commissioners must satisfy the rigorous requirements of strict scrutiny by demonstrating a vital interest in regulating respondent's speech. See *Blackburn*, 42 F.3d at 932.

Under this approach, the analysis is straightforward. At no point in this litigation have the Commissioners alleged that termination of respondent's contract based on his critical

¹⁵ The contract between the parties itself specifies that Umbehr was to serve as "an independent contractor and that he, his agents, and employees are not agents or employees of the County or any City." P.A. 108. It also ensured that he would not be viewed by the public as a representative of the County by mandating that his vehicles bear "the name and phone number of the contractor." P.A. 109.

editorial expressions served anything resembling a compelling interest. In fact, they have never suggested that his speech on any of the topics he discussed interfered with his performance under the contract in any way, an acknowledgement that is fatal to any attempt to establish a legitimate, let alone a vital, government interest. The Commissioners, therefore, have failed to meet their obligation under the strict scrutiny formulation and thus respondent's speech is clearly protected from retaliatory action.

2. Even Under *Pickering*, Respondent's Interest In Speaking Would Outweigh The County's Interest In Regulating His Speech

Even if the Court were to conclude that the more restrictive test applicable to public employees should be extended to independent contractors, respondent's speech would still fall comfortably within the First Amendment's protective scope. There is no dispute that the topics on which respondent wrote and spoke out, ranging from the right of county residents to obtain open access to their government to the mismanagement of taxpayer resources, constitute the type of core political speech that is deserving of the utmost protection.¹⁶

¹⁶ The only subject of respondent's columns that the Commissioners even suggest is not a matter of public interest is the county landfill. Pet. Br. at 32. Yet it is apparent from the record that this issue, which is unrelated to the solid waste collection contract, was more than a dispute about conditions of employment. When the County was considering closing the landfill altogether, respondent joined others in voicing concern about the potential adverse effects on the environment, including an increase in illegal roadside dumping, if a convenient landfill were not
(continued...)

This conclusion becomes all the more apparent when respondent's criticisms of the county government are compared to the types of speech this Court has found protected in the public employment context. See, e.g., *Rankin*, 483 U.S. at 387-89 (statement by law enforcement employee expressing abstract hope that future assassination attempts against President will be successful); *Givhan*, 439 U.S. at 413 (privately expressed complaint about school policies by teacher); *Mt. Healthy*, 429 U.S. at 282 (criticism by teacher of newly enacted dress code); *Perry*, 408 U.S. at 595 (statements by professor critical of university policy); *Pickering*, 391 U.S. at 566 (complaint by teacher about school board fundraising practices and criticism of board's allocation of resources).¹⁷ Placed in this context, the expression at issue in this case is especially deserving of protection, not

¹⁶(...continued)

available. P.A. 57. With regard to the dramatic increases in user fees effected by the Commissioners, respondent's articles largely reflected his belief that the Commissioners were abusing their powers of office by using landfill rates as a method of retaliation. P.A. 79, 84. Moreover, these issues had obvious repercussions for all members of the community and in each instance the elected representatives of the cities requested public meetings with the County Commission. P.A. 57, 84. And finally, contrary to the Commissioners' representations, respondent had little personal interest in landfill user rates because his contract specifically permitted him to pass any increase on to his customers. P.A. 107 (defining unanticipated events to include increased landfill rates). These comments, therefore, both in terms of content and the context in which they occurred, can hardly be viewed as mere "workplace grievances."

¹⁷ These decisions, each of which involve criticism of a nominal supervisor, effectively rebut the Commissioners' suggestion that were he an employee, respondent "could have been fired for insubordination . . . despite the public interest in the issues at stake." Pet. Br. at 22.

only because it took place in the quintessential First Amendment forum, a local newspaper, but because it provided information and ideas to residents of the county on a wide array of government policies -- precisely the type of speech that is essential for the democratic process to function efficiently.

Conversely, the government's interest in regulating respondent's speech in this case is virtually non-existent both because the topics he addressed were unrelated to the contractual agreement itself and because the speech did not interfere with performance. First, one of the principal reasons that this Court has applied a more restrictive balancing test in its employment cases is the fact that the speech at issue involved matters closely connected to the employment relationship. *NTEU*, 115 S. Ct. at 1013 n.11 (noting that virtually all of the Court's employment cases involve speech related to the workplace). The topical relation of the speech to the duties an individual performs creates an increased risk of interference with the government's legitimate interest as an employer in regulating the office environment. In this case in contrast, there is no nexus between the comments made by respondent and the contractual relationship between the parties. Accordingly, premising the decision to terminate respondent's trash collection contract on speech that bears no connection to the relationship cannot plausibly advance any legitimate government interest. *Id.* at 1012, 1015 (honoraria ban imposed on federal employees restricted speech that was both unrelated to the employment relationship and unlikely to interfere with office efficiency).

Additionally, regardless of the subject matter, the Commissioners have never suggested that Umbehr's speech caused any interference with performance under the

agreement. Because the only conceivable government interest in this context, as in the employment area, is in ensuring proper performance of government services, this fact alone is decisive. *NTEU*, 115 S. Ct. at 1012-15 (speech was unrelated to duties and did not adversely impact workplace); *Rankin*, 483 U.S. at 388 ("no evidence that [speech] interfered with the efficient functioning of the office"); *Pickering*, 391 U.S. at 572 (speech did not impede "proper performance of his duties"); *Wood*, 370 U.S. at 394 ("no indication that the publications interfered with his duties").¹⁸ Rather than advancing legitimate government interests, termination of the contract served as a convenient vehicle to punish respondent's criticism of the Commissioners' policies -- a result that is completely at odds with fundamental First Amendment principles. Just as "[v]igilance is necessary to ensure that public employers do not use their authority over employees to silence discourse, not because it hampers public functions, but because superiors disagree with the content of the employees' speech," so too must this Court ensure that government officials do not use their contractual relationships as a mechanism for curbing speech they find offensive. *Rankin*, 483 U.S. at 384.

¹⁸ Even with regard to the county landfill, the one subject that is, at best, tangentially related to the solid waste collection contract, the Commissioners do not contend that performance under the collection agreement was impaired by respondent's critical articles on this issue. As a consequence, termination of the contract based on respondent's criticism of the landfill policies would have been unrelated to the county's interest in "the efficiency of the public services it performs." *Pickering*, 391 U.S. at 568.

II. Petitioners Have Failed To Articulate Any Coherent Theory For Either Eliminating Or Severely Restricting The First Amendment Rights Of Independent Contractors

The Commissioners appear to advance three principal arguments in support of their assertion that independent contractors enjoy little or no First Amendment protection. First, they contend that due to the nature of the independent contractor relationship, local officials must be free of any constraints, including constitutional limitations, on the ability to control their contractual agreements. Second, they maintain that the Tenth Amendment reserves decisions about government contracting to state and local officials. And third, assuming some level of First Amendment protection, they contend that allegations of retaliation by independent contractors should be analyzed under the test applied to content-neutral regulations having only incidental effects on speech. None of these contentions warrants either withdrawing or limiting the First Amendment rights of independent contractors.

A. Local Officials Neither Need Nor Possess Authority To Abrogate Constitutional Guarantees To Exercise Appropriate Control Over Their Contractual Relationships

The Commissioners maintain that, in contrast to the daily interaction and oversight involved in the employee-employer relationship, government officials have a diminished ability to monitor and direct the activities of independent contractors. Based on this distinction, they insist that the right

of termination takes on added importance in this context. Pet. Br. at 17-23. Because, in their view, termination is the only method of ensuring proper performance, they insist that "the right of control must include the power to revoke such a delegation with impunity." *Id.* at 9.

The Commissioners' extended analysis of the differences between independent contractors and employees misses the point of the First Amendment inquiry entirely. Pet. Br. at 17-23. Although the discussion confirms that government officials generally have less managerial control over independent contractors, it fails to explain how the speech of independent contractors on matters of public concern interferes with the government's ability to deliver needed services or why government officials must be free to consider such speech to exercise appropriate control over their contractual relationships. See *NTEU*, 115 S. Ct. at 1013; *Waters*, 114 S. Ct. at 1887 (government generally must make substantial showing that speech will be disruptive).

Nor do the Commissioners even attempt to demonstrate that the nature of the relationship mandates greater discretion to consider expressive activity. Instead, they maintain that only a broad prohibition on all claims of retaliation will provide sufficient protection for the discretionary authority of local governments and their officials. Pet. Br. at 17. According to the Commissioners, therefore, even suits involving demonstrable instances of official retaliation against speech should be precluded to protect government officials from insubstantial claims.

This extraordinary assertion -- that core First Amendment values should be sacrificed to a rule of administrative expediency -- finds no support in this Court's precedents. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963)

(state's speculative assertions about potential abuse insufficient to justify First Amendment infringement). On the contrary, "[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963) (citations omitted). Indeed, this Court's First Amendment jurisprudence is premised, in all but a handful of cases, on conducting a carefully calibrated balance between the interests of the individual in speaking and the government's interest in curtailing speech. *Barenblatt v. United States*, 360 U.S. 109, 126 (1959) (resolution of First Amendment issues "always involves a balancing by the courts of the competing public and private interests at stake"); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 276 (1971) (First Amendment issues are resolved "through case-by-case adjudications"). Yet, under the peculiar calculus of interests advanced by the Commissioners, government officials may take adverse action against independent contractors based on their expressive activity without demonstrating *any* corresponding interest in restricting speech.¹⁹

More generally, the contention that government officials must have authority to revoke contractual agreements for any reason, including an individual's exercise of fundamental freedoms, not only adopts a remedy that is

¹⁹ The related suggestion that the "courts do not have the resources" to entertain such "petty" claims by independent contractors "even if the Constitution permitted it" knows no parallel in this Court's history. Pet. Br. at 30. In effect, the Commissioners contend that the judiciary has discretion to nullify constitutional protections because there may be too many individuals whose rights have been violated, a proposition this Court has never countenanced. Cf. *Rutan*, 497 U.S. at 75 & n.8.

grossly out of proportion to the perceived harm, but it is "at war with the deeper traditions of democracy embodied in the First Amendment." *Elrod*, 427 U.S. at 357 (citation omitted). The *per se* rule the Commissioners propose would create a series of jurisprudential anomalies. Most notably, it places the speech of independent contractors, even on issues central to the democratic process, into one of the "narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem" -- on par with obscenity and communications likely to incite imminent lawlessness. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). See also *Roth v. United States*, 354 U.S. 476, 485 (1957); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). The Commissioners' formulation also would invert the well-established First Amendment hierarchy by protecting independent contractors when they are "hawking [their] wares," while subjecting them to official reprisals when participating in core First Amendment activities. *Bellotti*, 435 U.S. at 784 n.20 (speech on matters of public concern is entitled to greater protection than commercial speech).

Perhaps even more troubling is the fact that the rationale underlying the Commissioners' theory does not appear to be limited to the First Amendment context. The need for complete control, which the Commissioners contend is essential to efficient government operations, seemingly would require the forfeiture of other constitutional protections as well. To provide the Commissioners with the unfettered discretion they demand and to ensure that local officials are not "blackmailed" by threats of meritless litigation, the Court would be forced to shield local officials from allegations of discrimination on the basis of race, sex, religion, or national origin. Neither state nor municipal actors, however, have

authority to regulate their contractual relations free from the limitations imposed by the Constitution. See, e.g., *City of Richmond v. Croson Co.*, 488 U.S. 469, 493 (1989).

Despite the Commissioners' protestations to the contrary, responsible government officials can exercise appropriate control over the provision of needed services without a right to retaliate against speech or to transgress other basic freedoms. Government officials retain the discretion to terminate contractors for any legitimate programmatic reason, including failure to perform, or for no reason at all. *Rankin*, 483 U.S. at 383; *Mt. Healthy*, 429 U.S. at 283. They have no authority, however, to allocate resources based on the consideration of factors the Constitution proscribes. *Id.*

B. The Tenth Amendment Does Not Authorize The Violation Of Other Constitutional Provisions

Petitioners next advance the novel contention that any limitation on elected officials' discretionary authority would result "in a wholesale transfer of power from elected representatives . . . to the courts" in derogation of the Tenth Amendment's reservation of power to the states. Pet. Br. at 23-26. Petitioners have never, in the district court, the Tenth Circuit, or in their Petition, even made reference to the Tenth Amendment. Accordingly, the contention has been waived. *Caspari v. Bohlen*, 114 S. Ct. 948, 952 (1994) (Court will only address questions raised in the petition); *EEOC v. FLRA*, 476 U.S. 19, 24 (1986) (per curiam) (arguments not raised below will not be considered).

The procedural bar aside, the argument is easily dismissed. The Tenth Amendment, by its very terms, poses no obstacle to First Amendment review of state action:

The powers not delegated to the United States by the Constitution, *nor prohibited by it to the States*, are reserved to the States respectively, or to the people.

U.S. CONST. amend. X (emphasis added). Because the First and Fourteenth Amendments prohibit the states from abridging the freedom of speech, the Tenth Amendment raises no bar to First Amendment claims. See *Gitlow v. New York*, 260 U.S. 652 (1925).²⁰

The Commissioners' attempt to invoke legislative immunity similarly is unavailing. Pet. Br. at 25. First, the Court of Appeals held that legislative immunity is a defense only to individual liability claims, not to the claims registered against individuals in their official capacities. J.A. 38. Petitioners did not seek review of that conclusion in their Petition for Certiorari and thus the issue has been forfeited. *Waters*, 114 S. Ct. at 1891. Second, apart from the failure to raise this issue in the Petition, the executive act of terminating respondent's contract cannot plausibly be viewed as legislative

²⁰ A separate strand of the same general thesis suggests that "judicial interference" with the decisions of elected representatives is inappropriate. Pet. Br. at 24-25. "The Fourteenth Amendment, as now applied to the States," however, "protects the citizen against the State itself and all of its creatures -- Boards of [County Commissioners] not excepted." *Board of Education v. Barnette*, 319 U.S. 624, 637 (1943). *Wood*, 370 U.S. at 386 (courts retain power to set parameters of state power regarding freedom of speech).

in nature and thus concepts of legislative immunity are inapplicable. Third, the court of appeals correctly concluded that even if legislative immunity were applicable it would preclude only claims asserted against the Commissioners in their individual capacities. See *Kentucky v. Graham*, 473 U.S. 159, 166-67 (1985) (government may not rely on individual capacity defenses); *Owen v. City of Independence*, 445 U.S. 622, 651 (1980).

C. Viewpoint-Based Retaliation Cannot Be Characterized As An Incidental Restriction On Speech

Arguing in the alternative, the Commissioners contend that, if applicable, *Pickering* "must be reformulated and redescribed to fit the circumstances of an independent contractor." Pet. Br. at 26. Without offering any rationale, petitioners contend that a claim of intentional discrimination based on disapproval of the speaker's message should be subject to the same level of scrutiny applied to neutral regulations that have only incidental restraining effects on speech. *Id.* The type of view-point based discrimination at issue in this case, however, is subject to the most exacting scrutiny, see *supra* at 19, 32, not to "the least stringent test of constitutional limitation." Pet. Br. at 26. Compare *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (upholding regulation designed to control volume of music as content-neutral restriction).

The remainder of the arguments in this section of the Commissioners' brief discuss a series of unrelated points, none of which are relevant to determining the appropriate First Amendment standard for independent contractors. Pet.

Br. at 27-32. The one substantive assertion that emerges from the discussion, however, is the contention that principles of qualified immunity preclude reliance on the Commissioners' motivation in establishing the claim. *Id.* at 29-30. Even aside from the misstatement of the applicable standard,²¹ qualified immunity principles can provide no defense to the official capacity claims currently at issue. *Graham*, 473 U.S. at 166-67 (entity may not rely on individual capacity defenses); *Owen*, 445 U.S. at 651.

III. The Commissioners' Assorted Defenses Are Both Procedurally Barred And Inapplicable

In their final series of contentions, the Commissioners ask the Court to address a virtual laundry list of defenses that have never been raised previously and that in any event are inapplicable to this case.

1. *The alleged default for non-payment of landfill rates provides no defense.* In a theme they attempt to establish from the outset of their brief, the Commissioners contend that respondent was in default under the terms of the solid waste collection contract based on his refusal to pay the new landfill rates during the pendency of his state court challenge. Pet. Br. at 33. They maintain that this fact limits the availability of damages under *McKennon v. Nashville Banner Pub. Co.*,

²¹ Motivation is not irrelevant, even in individual capacity claims, where intent is an element of the claim. "Every circuit that has considered the question has concluded that a public official's motive or intent must be considered in the qualified immunity analysis where unlawful motivation or intent is a critical element of the alleged constitutional violation." *Tompkins v. Vickers*, 26 F.3d 603, 607-08 (5th Cir. 1994).

115 S. Ct. 879, 886 (1995), an age discrimination case in which the defendant uncovered information after termination that provided an alternative ground for the adverse action.

First, petitioners have never raised this issue in the litigation to date and thus may not present the defense at this juncture. *EEOC v. FLRA*, 476 U.S. at 24. Second, *McKennon* dealt only with *after-acquired* evidence "which would support a lawful termination for cause." Pet. Br. at 33. In this case, Umbehr brought suit challenging the landfill rates on June 1, 1990, D.A. 178, and as of January 28, 1991, the date the contract was cancelled, had been in what the Commissioners now describe as "default" for nearly eight months. Although the Commissioners were fully aware of the relevant facts, "this cause was not expressly invoked at the time." Pet. Br. at 33. Third, even if there had been a default, it would not provide an alternative ground for termination because the Commissioners themselves failed to comply with the terms of the contract. The relevant provision in the agreement required "written notice stating in detail a description of the facts constituting the breach" and a thirty-day opportunity to cure, P.A. 108, neither of which the Commissioners provided.

2. *The Commissioners have never alleged they had "mixed motives" for terminating the contract.* While *Mt. Healthy*, 429 U.S. at 287, provides a constitutional standard of causation that applies equally to claims of retaliation by employees and independent contractors, the Commissioners did not present a mixed motive defense in either the district court or the court of appeals, nor do they make any effort in this Court to demonstrate its application. Accordingly, this argument is not properly presented both because it was not

preserved below, *EEOC v. FLRA*, 476 U.S. at 24, and because the question is not implicated in this case.

3. *The Commissioners have never alleged respondent is a "policy maker."* Without contending that respondent is in a policy-making position or that this case involves patronage practices, the Commissioners suggest that the Court should make clear that an "independent contractor whose responsibilities include the formulation of policy should be [] terminable without cause." Pet. Br. at 34. Given that this issue is neither implicated in this case, and thus presents no Article III case or controversy, nor has been argued below, the Court has no occasion to render an opinion on this question. See *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973) ("courts are not roving commissions assigned to pass judgment on the validity of" abstract questions).

4. *The Commissioners did not rely on an erroneous understanding of respondent's speech.* The Commissioners next misapply this Court's holding in *Waters v. Churchill*, 114 S. Ct. 1878 (1994), by contending that it insulates government officials from liability if they "reasonably believed on the facts available that no First Amendment issue was presented." Pet. Br. at 34. They argue that, because they were granted qualified immunity in their individual capacities, they are, under *Waters*, likewise immune from suit in their official capacities.

First, the Commissioners did not raise this contention below and thus it has been waived. Second, the plurality in *Waters* did not purport to shield government entities from liability for good faith, but erroneous understandings of the law. Rather, it concluded that good faith, but erroneous understandings of the facts may provide a defense where "what the government employer thought was said" would not

be protected by the First Amendment. *Waters*, 114 S. Ct. at 1882. Suffice it to say, the Commissioners have never alleged that they misunderstood the import of respondent's criticisms and terminated the contract "based on substantively incorrect information." *Id.* at 1890.

In any event, individuals may not bootstrap a finding of qualified immunity into a defense against official capacity claims. *Owen*, 445 U.S. at 651 & n.33; Rodney A. Smolla, *Federal Civil Rights Acts* 14-55 (3d ed. 1995). As a result, the fact that the Commissioners escaped personal liability has no effect on the ultimate obligation of the County to redress the constitutional wrongs committed. *Id.* at 657-58. See also *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S. Ct. 1160, 1162 (1993).

5. *There is no obligation to exhaust state judicial remedies prior to pursuing a federal constitutional claim under section 1983.* The Commissioners final contention is that respondent's action is foreclosed because he "chose to file a federal civil rights action in U.S. District Court rather than seeking any relief by way of appeal to the Kansas State Courts." Pet. Br. at 34-35. Again, this assertion was presented in neither the district court nor the court of appeals and thus has been waived. Moreover, decisions of this Court extending back over three decades have rejected this precise contention. "It is no answer that the State has a law which if enforced would give relief. The federal remedy [under section 1983] is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe v. Pape*, 365 U.S. 167, 183 (1961). See also *Heck v. Humphrey*, 114 S. Ct. 2364, 2370 (1994); *Wright v. Roanoke Redevelopment and Hous. Auth.*, 479 U.S.

418, 429 (1987); *Board of Regents v. Tomanio*, 446 U.S. 478, 491 (1980).

CONCLUSION

For these reasons, the judgment of the Court of Appeals for the Tenth Circuit should be affirmed. Further, because the Commissioners, regardless of the test applied, can demonstrate no interest in premising their decision to terminate respondent's contract on his speech, the case should be remanded solely for a factual determination concerning the Commissioners' actual motivation for the challenged action.

Respectfully submitted,

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